Huttig Sash and Door Company d/b/a Weather Shield of Connecticut *and* International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), Local 376, AFL–CIO. Cases 39–CA–3516–2, 39–CA–3648, and 39–RC–754

September 28, 1990

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On April 27, 1989, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. The Charging Party has excepted to the judge's recommendation to dismiss complaint allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by more strictly enforcing work rules because its employees engaged in union and other protected concerted activities and by disparately applying those rules in disciplining union activist employees. In addition, the General Counsel and the Charging Party have excepted to the judge's recommendation to dismiss allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Douglas Clark and Brian Kniffin because of their union activities. For the reasons which follow, the Board finds merit in the exceptions with respect to the enforcement of stricter working rules[2] and to Kniffin's discharge, but it affirms the judge's finding that the Respondent lawfully discharged Clark.[3]

On April 16, 1987,[4] the Union held an organizing meeting at which a number of the Respondent's employees, including Brian Kniffin, James Biegaj, and Douglas Clark, signed union authorization cards. During late April and early May, these three employees solicited other employees to sign cards at the Respondent's plant. At some point in this same period, Kniffin, Biegaj, and Clark also complained about mandatory overtime in a meeting with Richard Michnowicz, who was plant superintendent at the time. Michnowicz testified that he knew of the Union's organizing campaign in late April. He also had conversations in early May with employee Thomas Franklin during which Michnowicz inquired about union activities.[5] The Union filed its petition for a Board-conducted representation election on May 26.

In late April and through May, the Respondent issued a number of verbal and written warnings to Kniffin, Biegaj, and Clark. According to Kniffin, the regular starting time of 7 a.m. had never before been strictly enforced, he had been given permission by Michnowicz to arrive as much as 15 minutes late, and he regularly arrived at work after 7:05 a.m. as a consequence of his bus schedule. After signing a union authorization card, however, Kniffin received one verbal and two written warnings for tardiness.[6] Kniffin had not been warned previously for this infraction.

Biegaj testified that since he began working for the Respondent in November 1986 he would arrive late for work two or three times a week. He had observed other workers arrive late for work and was not aware of their being disciplined. This observation was at least partially corroborated by Franklin, who testified that before he left his job with the Respondent on May 6 he had observed three or four other employees come in late several times a week. Despite his uncontroverted pattern of tardiness, Biegaj had previously received only two verbal warnings in late March or early April. Michnowicz told him in early May, however, that tardiness would no longer be tolerated. On May 4, Biegaj first received a written warning for lateness.

Clark began working for the Respondent on February 2. At the end of April, Clark received a verbal warning for leaving at the regular quitting time of 3:30 p.m. with work still at his station. He testified that he had previously done so without receiving a warning

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] As set forth in the attached dissent, Member Devaney would adopt the judge's recommendation to dismiss this complaint allegation.

[3] As set forth in the attached dissent, Member Cracraft would reverse the judge to find that Clark's discharge violated Sec. 8(a)(3).

[4] All subsequent dates are in 1987 unless stated otherwise.

[5] The judge found, and we agree, that Michnowicz' interrogation of Franklin violated Sec. 8(a)(1). In agreeing with the judge's finding, Chairman Stephens relies in particular on Franklin's unrebutted testimony that Michnowicz continued to question him even though Franklin had informed Michnowicz that he did not want to discuss the ''Union business.'' Member Cracraft does not rely on *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), or on the absence of evidence that Franklin and the questioning supervisor maintained a friendly relationship.

[6] The dating of Kniffin's oral warning requires choosing from alternatives in his testimony: a ''couple weeks'' after signing his authorization card (Tr. 22); ''early April'' (Tr. 36); ''No, I'm sorry. The middle [of April.]'' (Tr. 37) Chairman Stephens and Member Cracraft note that the judge chose early April as the warning date, without explanation, even though Kniffin immediately changed his testimony as indicated above when asked about the accuracy of this date. Furthermore, the ''early April'' date cannot be reconciled with Kniffin's testimony that all discipline came after his April 16 card signing. Accordingly, Chairman Stephens and Member Cracraft find that Kniffin received his oral warning sometime between April 16 and 30. For the reasons set forth in his dissent, Member Devaney would agree with the judge's dating of the warning.

and that other employees had left unfinished work and had not been disciplined. On May 4, Clark received a written warning for poor attendance and another for poor production.

Clark, Kniffin, Biegaj and other employees discussed among themselves the perception that discipline was being unfairly enforced. These employees then went to Michnowicz and registered their complaints. Michnowicz' testimony about this encounter was very brief. He stated that he explained the basis on which he issues reprimands, which was to avoid making them a matter of general knowledge and to discuss them only in conversation with the particular employee being disciplined.[7]

After the employee group complaint about overtime, Michnowicz posted a notice informing employees that they would have to remain at work until 5 p.m. unless they received permission to leave earlier. The Respondent did not have any other written attendance or disciplinary rules during the period at issue.[8] There is no documentary evidence of disciplinary actions taken, and there is no direct testimonial evidence about actions taken against any employee other than Kniffin, Biegaj, and Clark.[9] John Slavin, in charge of purchasing and scheduling for the Respondent, was not directly involved in any of the aforementioned disciplinary actions, but he testified that he did not know of any change in the amount of reprimands given.

Clark missed a day's work on June 2 because of an eye injury. On June 4, Clark arrived at work to find that his timecard was missing. He was directed to Branch Manager Michael Morton, who suspended Clark for a day because of his absence and told him that he would need a doctor's note in order to continue his employment.

Kniffin reported to work that same day and also discovered that his timecard was not in the rack. He went to Morton's office, where Michnowicz told Kniffin that he was fired for ''misconduct and lack of production.'' At a subsequent unemployment compensation hearing, Morton testified that the real reason for Kniffin's discharge was that he left work early on June 3. Morton did not testify in the instant proceeding. According to the credited testimony of Michnowicz, Kniffin left work without permission at 1 p.m. on June 3. Michnowicz further testified that he recommended a written warning for this incident.

On June 16, Morton told Clark that he was being discharged because his production was not up to standard. The credited testimony of management officials, Michnowicz and Slavin, as well as fellow window department workers, Yurko and Arnold Turner, is that although the quality of Clark's work was good, his daily production output was erratic and markedly less than that of Yurko and Turner. According to Slavin, he recommended Clark's discharge because of deficient productivity, a problem that had existed from the beginning of Clark's employment.[10] Michnowicz also discussed production problems with Clark and, as previously noted, gave him a written warning for poor production in early May.

Biegaj testified that Morton told him on June 16 that Clark's discharge was for lack of production and had nothing to do with union activity. In the same conversation, Morton offered Biegaj a promotion which the employee declined 3 days later. Biegaj further testified that in late June, newly appointed Plant Superintendent Leaf DeValentino came into the receiving department and said ''from now on, because of my little friend out there, we will not tolerate tardiness or leaving before the job is done.'' As he spoke, he gestured toward the parking lot at the front of the plant where Douglas Clark was distributing union literature. As further discussed below, the judge erroneously stated in his decision that Biegaj ascribed this conduct to Michnowicz, who no longer held a supervisory position at the time. The record unambiguously supports the contention in exceptions that Biegaj actually referred to DeValentino, who had replaced Michnowicz.

On about June 26, the Respondent conducted an employee survey about attitudes toward supervisors, working conditions, wages, and any grievances the employees might have. The Respondent had never conducted such a survey before. During a preelection meeting with employees on July 17, the Respondent's new branch manager, Coulter Schmitt, reacted to employee inquiries by promising to provide production employees with an equipped lunchroom. On July 27, 6 days after the election, a lunchroom with a microwave oven and a refrigerator were provided for unit employees. For reasons fully set forth in the judge's decision, he found, and we agree, that the employee survey and the promise and provision of a lunchroom violated Section 8(a)(1). We further find that the interrogation of Franklin, the survey, and the promise of a lunchroom constituted preelection conduct that interfered with the employees' free choice and that accord-

[7] The judge's discussion of group employee complaints to Michnowicz seems to indicate that they were conveyed during a single meeting in late April or early May. The consensus testimony of Kniffin, Biegaj, Clark, and Michnowicz, however, is that there were two separate meetings. The later meeting involved the disciplinary issue and took place sometime in May or the beginning of June.

[8] Foreman John Yurko testified that the Respondent had a progressive disciplinary ''system of several warnings, days off from that point, and dismissal.''

[9] According to Clark, Michnowicz stated in his meeting with employees about discipline that Foreman John Yurko had a few warnings on his file also. Neither Michnowicz nor Yurko mentioned warnings to Yurko in their testimony.

[10] According to a 37-day production analysis prepared for Clark's unemployment compensation hearing and subsequently introduced as evidence in this case, Clark's coworkers Yurko and Turner each produced window units at hourly and daily averages more than 40 percent higher than Clark produced.

ingly warrants setting aside the election in the event that a revised tally shows that a majority of ballots have not been cast for the Union.[11]

As previously stated, Chairman Stephens and Member Cracraft disagree with the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) by more strictly enforcing its work rules. In the judge's brief analysis of the issue, he stated that

> [t]he sole evidence supporting this allegation is Biegaj's uncontradicted testimony that in late June, Michnowicz [identified Clark as the reason] Respondent would no longer tolerate lateness or leaving work prematurely. However, . . . Michnowicz was no longer a supervisor or agent of Respondent at the time as his last day of employment with Respondent in that capacity was June 12.

The judge made a critical error in identifying Michnowicz as the individual about whom Biegaj testified. Biegaj clearly attributed this statement to new Plant Superintendent DeValentino. Consequently, this uncontradicted and implicitly credited testimony is direct evidence that there was a discriminatory change in work rules by the Respondent because of the protected union activities of its employees. The judge further erred by stating that Biegaj's testimony was the sole evidence supporting the 8(a)(3) allegation. The judge thereby failed to acknowledge in his analysis the corroborative and uncontradicted testimony of Kniffin, Biegaj, Clark, and Franklin set forth in the factual section of the judge's decision and reiterated in this decision. These witnesses stated that after the Union's campaign began in mid-April, warnings were issued for conduct that was frequent and notorious in the Respondent's workplace. With the exception of two or three oral warnings, this conduct had been condoned or, in Kniffin's case, expressly permitted. By early May, however, after Michnowicz admittedly knew about the employees' union activity and after he had received group complaints about overtime, he told Biegaj that tardiness would no longer be tolerated. Absent any explanation for this statement, its timing relative to the nascent union campaign and to the protected concerted overtime complaints warrants an inference of unlawful motivation.

Based on the foregoing, Chairman Stephens and Member Cracraft find that the General Counsel has made a strong prima facie showing of unlawful discriminatory intent in the Respondent's stricter enforcement of work rules. The only evidence to the contrary is Slavin's general testimony that he did not know of any change in the amount of reprimands given. This evidence is plainly insufficient to rebut the prima facie case. Accordingly, Chairman Stephens and Member Cracraft conclude that in and after late April 1987 the Respondent violated Section 8(a)(3) and (1) and engaged in objectionable conduct by more strictly enforcing work rules in retaliation for employees' union and other protected concerted activities.[12]

With respect to the allegations that the discharges of Kniffin and Clark violated Section 8(a)(3) and (1), the judge found that the General Counsel had established a prima facie case—based on the employees' union activity, the Respondent's awareness of such, and the timing of the discharges in relation to this activity—sufficient to support the inference that protected activity was a motivating factor in the Respondent's discharge decisions. Under the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the burden shifted to the Respondent to show that it would have discharged Clark and Kniffin even in the absence of their union activities. The judge concluded that the Respondent had met its burden. He found that ''[m]ost persuasive is the absence of any evidence of Union animus on the part of the Respondent.'' In addition, he relied on credited testimony that Kniffin did leave work early on June 3 without permission and that Clark's production was substantially below that of Yurko and Turner.

The judge's finding about the absence of animus, an evidentiary factor usually reviewed in reference to the prima facie case supporting allegations of discriminatory motivation, is clearly incorrect. Even based solely on the judge's own decision, the Respondent's animus to the Union is reflected in findings that the Respondent violated Section 8(a)(1) by interrogating Franklin, by the promise and provision of a lunchroom, and by the solicitation of grievances and implicit promise to remedy them through an unprecedented employee survey. Further evidence of animus is found both in the DeValentino statement to Biegaj about Clark's activities and in the unlawful stricter enforcement of work rules, discussed above in this decision.[13] All of this evidence of animus further bolsters the General Counsel's prima facie case of unlawful discriminatory motivation in the discharges of Kniffin and Clark.[14]

We turn now to the question of whether the Respondent met its burden under *Wright Line* of proving that it would have discharged these employees even in the absence of their protected union and other con-

[11] We find it unnecessary, however, to pass on the Petitioner's Objection 1, because the other objections provide a sufficient basis for setting aside the election.

[12] We find it unnecessary to pass on the allegation in the complaint and the Union's exceptions that the Respondent also disparately applied its stricter rules only against known union activists. The finding of such an additional violation would not materially affect the Order.

[13] Because he would not find that the Respondent unlawfully imposed stricter rules, Member Devaney would not rely on this evidence in finding animus.

[14] Contrary to the judge, we do not view Morton's June 16 offer of a promotion to Biegaj as persuasive evidence of the Respondent's lack of animus.

certed activities. With respect to Kniffin, we affirm the judge's credibility-based finding that he did leave work early without permission on June 3. We find, however, that the Respondent's reliance on this incident as a basis for Kniffin's discharge was purely pretextual. According to Kniffin's uncontradicted testimony, Michnowicz told him initially that he was being discharged for ''misconduct and poor production,'' making no reference to the employee's June 3 absence. This absence did not emerge as the purported reason for discharge until subsequent unemployment compensation and unfair labor practice litigation. Furthermore, the Respondent has failed to explain why Kniffin's discipline did not follow the progressive system described by Yurko, why it did not reflect Michnowicz' recommendation of the lesser discipline of a written warning, or why on the same day it discharged Kniffin for leaving work a few hours early but gave Clark only a 1-day suspension for a full day's absence. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) and engaged in objectionable conduct by discharging Kniffin.

With respect to Clark, however, Chairman Stephens and Member Devaney agree with the judge that the Respondent has met its burden under *Wright Line*. Clark had worked for the Respondent for approximately 4-1/2 months. Although the quality of his work was acceptable, his two coworkers produced at least 40 percent more windows than he did. These coworkers complained about his consistently inferior productivity. Michnowicz and Slavin repeatedly told Clark about his low productivity, leaving work undone at the end of the day, and leaving his work area. Michnowicz testified that he advised Clark that if he did not stay at his work area and do the work he would be disciplined. Clark received a written warning on May 4 for poor production and poor attendance, and on June 4 he was suspended for 1 day for an unauthorized absence. The circumstances of Clark's discharge were unlike those of Kniffin's in several crucial respects. Clark's discharge, unlike that of Kniffin, followed the Respondent's progressive discipline system, i.e., Clark had first been given oral warnings, and then (on May 4) a written warning concerning his low production.[15] Furthermore, there is no evidence that any other employee engaged in the same conduct (substantially underproducing) without suffering the same discipline. Finally, the ground which the Respondent now asserts for the discharge was the reason the Respondent gave to Clark when it discharged him; and Clark did not, when told, claim that his production was acceptable or that this was not a proper ground for discharge. For all of the foregoing reasons, Chairman Stephens and Member Devaney agree with the judge that, although the General Counsel made out a prima facie case that union activity was a motivating factor in the discharge, the Respondent established a defense under *Wright Line* by showing that it would have discharged Clark even in the absence of his union activity.[16]

2. The Respondent has excepted to the judge's finding that it violated Section 8(a)(1) and engaged in objectionable conduct by the election eve announcement of pension benefits for its employees. We find merit in this exception.

On July 20, the day before the election, the Respondent's Branch Manager Schmitt circulated a letter informing employees for the first time that ''We do have a pension plan for non-union branches. After this company has been a part of Huttig for one year we will go to the Board of Directors for ratification. At that time this branch will have a pension plan for non-union employees.'' Management representative Slavin credibly testified that the Respondent would become eligible for parent corporation Huttig Sash and Door Company's pension plan a year from the September 1986 date of Huttig's purchase of the Respondent. Huttig's health benefits were also phased in as the Respondent's old benefit plans expired or came up for renewal.

The judge found that the employees would have received the pension plan even in the absence of the Union's organizing campaign, but that the timing of the Respondent's announcement of a previously unknown benefit warranted finding a violation of Section 8(a)(1) in the absence of any valid justification for making such an announcement at that time. In reversing this finding, we rely on *Scotts IGA Foodliner*, 223 NLRB 394 fn. 1 (1976), enfd. mem. 549 F.2d 805 (7th Cir. 1977), in which the Board held that the respondent's announcement during a union campaign of the availability of certain existing insurance benefits did not violate Section 8(a)(1). In *Scotts*, the Board stated that prohibiting an employer from publicizing existing benefits merely because the employees had not previously been made aware of such benefits would deprive the employer of a legitimate campaign strategy necessary to counter the union's claim that it offers better benefits. Because the Respondent's pension plan was granted to employees in the normal course of

[15] Chairman Stephens finds no inconsistency in relying in part on the low production warnings to Clark, while concluding that the Respondent was acting in retaliation against the Union's campaign by engaging in stricter enforcement of work rules for such matters as tardiness and leaving work early. The incriminating statement by DeValentino linking stricter enforcement of work rules to employee union activity did not concern level of production.

Member Devaney does not find that the Respondent's enforcement of its work rules was unlawful and therefore relies on Clark's June 4 suspension for an unauthorized absence, as well as his earlier oral and written warnings for low production, as evidence that the Respondent followed its progressive discipline system.

[16] In light of the finding that the Respondent lawfully discharged Clark prior to the representation election in Case 39–RC–754, Chairman Stephens and Member Devaney affirm the judge in sustaining the challenge to Clark's ballot.

events unrelated to their union activity, the instant case is more akin to the announcement of existing benefits than to the cases relied on by the judge, which all involve the grant or announcement of new or future benefits. In accord with *Scotts*, we therefore find that the Respondent's announcement of its pension plan benefit did not violate the Act.[17]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4.

''4. The Respondent has violated Section 8(a)(3) and (1) of the Act by more strictly enforcing work rules and by discharging employee Brian Kniffin in retaliation for his union and other protected concerted activities.''

AMENDED REMEDY

Having found that the Respondent has engaged in the additional unfair labor practices discussed in this decision, we shall order the Respondent to cease and desist therefrom, to offer reinstatement to Kniffin, to make him whole for any loss of earnings and other benefits resulting from his unlawful discharge, and to make whole any employees who were adversely affected by the Respondent's unlawful stricter enforcement of its work rules. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest to be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, we shall order the Respondent to rescind the stricter enforcement of its work rules, to remove from its files any reference to the unlawful discharge of Kniffin and to disciplinary action taken pursuant to the unlawful strict enforcement of its work rules, and to notify affected employees in writing that this has been done and that the unlawful disciplinary actions will not be used against them in any way.

ORDER

The Respondent, Huttig Sash and Door Company d/b/a Weather Shield of Connecticut, Middletown, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their knowledge of, or activities on behalf of, a union.

(b) Conducting surveys of its employees' attitude toward their working conditions, implicitly promising thereby to correct inequities in their working conditions, in order to encourage opposition to a union.

(c) Promising or granting benefits to its employees in order to convince them to withdraw their support from a union.

(d) Discouraging membership in or activities on behalf of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 376, AFL–CIO, or any labor organization by discharging or disciplining employees or otherwise discriminating against them in their hire or tenure in retaliation for their union and other protected concerted activities.

(e) More strictly enforcing its work rules in retaliation for employees' union and other protected concerted activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the stricter enforcement of work rules which it has undertaken in retaliation for employees' union and other protected concerted activities.

(b) Make whole employees who suffered any loss of earnings and other benefits as a result of its unlawful stricter enforcement of work rules, in the manner set forth in the remedy section of this decision.

(c) Offer Brian Kniffin immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(d) Remove from its files any reference to the unlawful discharge of Brian Kniffin and to the discipline imposed pursuant to its unlawful stricter enforcement of work rules, and notify all affected employees in writing that this has been done and that the disciplinary actions will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[17] As noted by the judge, the relevant complaint allegation is that the Respondent promised to provide its employees with a pension plan if they rejected the Union as their collective-bargaining representative, in violation of Sec. 8(a)(l) of the Act. In his brief to the judge, the General Counsel claimed that the Respondent's conduct in this regard constituted not only an unlawful promise, but also an unlawful threat to not provide such a plan depending on the presence or absence of the Union. Similarly, the Charging Party argued in its brief to the judge that the Respondent's pension plan announcement communicated to employees the threat that if the Union won the election, the Respondent would not provide pension benefits to which they would otherwise be entitled. However, the judge found that the Respondent's announcement of pension benefits was unlawful solely on the rationale discussed above. The judge did not address the issue of whether the announcement constituted an unlawful threat, and neither the General Counsel nor the Charging Party excepted to his failure to do so. Under these circumstances, we express no view on the question of whether the Respondent's pension plan announcement constituted an unlawful threat, as we do not view that issue as properly before us.

(f) Post at its Middletown, Connecticut location copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

DIRECTION

IT IS DIRECTED that Case 39–RC–754 be severed from this proceeding and remanded to the Regional Director, who shall, within 10 days from the date of this Decision, Order, and Direction, open and count the ballots of James Hutton, David Clement, and Chris Johnson, and serve on the parties a revised tally of ballots. If the revised tally shows that the Union has received a majority of the valid ballots cast, a certification of representative shall issue.

If the revised tally shows that the Union has not received a majority of the valid ballots cast, a second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 376, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

CHAIRMAN STEPHENS, concurring.

I concur in the dismissal of the 8(a)(1) allegation concerning the Respondent's election eve announcement regarding the future availability of pension benefits, but I acknowledge that the issue is not entirely free of doubt.

NLRB v. Exchange Parts, 375 U.S. 405 (1964), as interpreted by subsequent authorities (see, e.g., *Nurses v. NLRB*, 729 F.2d 844 (D.C. Cir. 1984); *Pedro's Restaurant v. NLRB*, 652 F.2d 1005 (D.C. Cir. 1981); *American Sunroof Corp*., 248 NLRB 748 (1980)), holds that an employer bears a burden of justifying an announcement on election eve of its implementation of new increases in fringe benefits. Such an announcement presumptively interferes with the employees' Section 7 rights in the sense that they ''are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.'' 375 U.S. at 409. The employer in *American Sunroof*, cited by the Respondent here, met that burden when it demonstrated that the pension plan, which it announced on election eve, was developed long before the onset of the union campaign. The time of the announcement was neither accelerated nor delayed as a result of the campaign. The announcement in fact, was dictated by business considerations pertaining to the qualified tax status of the plan.

Similarly, in *Scotts IGA Foodliner*, 223 NLRB 394 (1976), enfd. mem. 549 F.2d 805 (7th Cir. 1977), noted by my colleagues, the Board found no violation where the employer brought to the employees' attention on election eve the availability of an existing health insurance plan of which employees had not been previously aware. Such an announcement was held to be a justifiable response to the union's campaign claims regarding fringe benefits coverage.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

The judge here found that the pension plan to which the Respondent referred was one which apparently employees would be entitled to as a matter of course by virtue of the acquisition agreement. To this extent, the case parallels *American Sunroof*. Similarly, as my colleagues find, to the extent that Scotts sanctions the right of an employer to respond to issues raised by others in the context of a representation campaign, there is evidence (albeit somewhat self-serving) that the Respondent's letter was prompted by questions raised by employees themselves about ''existing'' pensions.

With the Respondent having gone forward with evidence justifying its announcement, which the judge credited, it therefore was incumbent on the General Counsel to rebut that defense by showing that it was pretextual or otherwise flawed.[1] This the General Counsel did not do, and therefore the evidentiary scales tip (but only barely) in favor of dismissing this complaint allegation.[2]

MEMBER CRACRAFT, dissenting in part.

Contrary to my colleagues, I would find that the Respondent violated Section 8(a)(3) and (1) by discharging employee Clark notwithstanding his undisputedly poor productivity. In light of the General Counsel's strong prima facie proof of antiunion motivation, including Supervisor DeValentino's postdischarge identification of a union-handbilling Clark as the cause of stricter rules enforcement, the Respondent has failed to establish that it would have discharged Clark on June 16, 1987, for productivity problems in the absence of his union and other protected concerted activities.

Initially, I find that the Respondent has failed to show that Clark's productivity was a factor in its decision to discharge him. In this regard, I note that in unlawfully discharging fellow union activist Kniffin, the Respondent first asserted ''poor production'' as a reason in order to mask its unlawful antiunion motivation. In addition, the purchasing and scheduling manager, Slavin, testified that the Respondent does not have any formal production quotas. Furthermore, although then-Plant Superintendent Michnowicz did give Clark written warnings for poor production and absenteeism and suspended him for an unauthorized absence, all of this discipline followed the Respondent's unlawful stricter enforcement of work rules in response to the Union's organizational campaign and to overtime complaints by a group of employees including Clark. As often as Slavin and Michnowicz apparently talked to Clark about his shortcomings, there is no evidence that either management official specifically told Clark that these problems could lead to discharge. There is no evidence in fact that any other employee has been lawfully discharged for poor productivity.

Even assuming, arguendo, that Clark's poor productivity was a factor in the Respondent's decision to discharge, the record is bereft of explanation why his productivity was no longer tolerable at the particular time of his discharge. This deficiency was manifest from the beginning of his employment on February 2 and there is no indication that it became substantially worse in May or June. Furthermore, there is no evidence that the Respondent has a formal probationary period that would require an evaluation of whether to retain an employee after 4-1/2 months.

Based on the foregoing, I would find that the Respondent has failed to meet its burden under *Wright Line*[1] of proving that it would have discharged Clark for poor productivity even in the absence of his protected activity. Accordingly, I would find that Clark's discharge violated Section 8(a)(3) and (1), and I would also overrule the challenge to his ballot cast in the representation election.

MEMBER DEVANEY, dissenting in part.

I disagree with my colleagues' conclusion that the Respondent more strictly enforced its work rules in retaliation for its employees' union and other protected concerted activities and, although the majority does not pass on this issue, I would also affirm the judge's finding that the Respondent did not disparately apply its rules against employees who joined or assisted the Union. I do not believe that the General Counsel has established a prima facie case with respect to these allegations.

The complaint alleges that the discriminatory discipline began in ''about late April 1987.''[1] The judge's decision indicates that the Union's organizing activity began about mid-April and that the Respondent became aware of the union organizing efforts ''about the end of April.'' The Respondent's discipline, however, appears to have begun before it had knowledge of the employees' union activities, or, at the least, I am not persuaded that the General Counsel has shown otherwise. Employee Biegaj received oral warnings in March and early April and a written warning in May; Kniffin received an oral warning in either early, mid-

[1] The General Counsel retains the burden of proving unlawful employer motivation in the granting of a benefit during an election campaign. *Pedro's*, supra at 1010 fn. 11.

[2] As an example, although the judge found that the employees were entitled to coverage under Huttig's pension plan, the letter sent to employees describing the pension plan made a cryptic reference to the Respondent's ''going to the Board of Directors for ratification.'' Had the General Counsel developed evidence that pension coverage was contingent on the board of directors exercising its discretion (so that coverage might be extended depending on how employees voted on representation), then the pension benefits would be shown not to be a real existing benefit. Such proof would set this case apart from Scotts.

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[1] In his statement of the case, the judge incorrectly states that the complaint refers to an April 1, 1987 date.

or late April,[2] and a written warning in late April; and Clark received an oral warning in late April, a written warning in May and a suspension in June. Thus the evidence does not sufficiently demonstrate that there was a change in the Respondent's disciplinary patterns after it became aware of the union activity of these employees ''about the end of April.''[3]

In addition, I am not satisfied that the General Counsel sufficiently showed that other employees who committed similar infractions were treated differently from union supporters. Kniffin, Clark, and Biegaj testified that other employees arrived at work late or left work undone at the end of the day, and that the three complained among themselves and to Michnowicz that these other employees were not also being disciplined. However, Biegaj also testified that he was not aware of any other employees receiving discipline for being late, and that he did not know whether the other employees cited in the conversation with Michnowicz as also arriving late subsequently received discipline. Franklin was not asked whether the employees he had observed arriving late had been disciplined. Clark testified that when Yurko was mentioned to Michnowicz as deserving similar discipline, Michnowicz responded that Yurko had a few warnings in his file. Thus, there is no affirmative evidence that the Respondent knew of others arriving late or leaving early and did not discipline them.

In these circumstances, notwithstanding that the Respondent did not present documentary evidence of actions taken against others, I would not rely on the employees' assertions to Michnowicz as establishing in fact that others were not disciplined for infractions for which these prounion employees were disciplined. I do not believe this evidence is sufficient, regardless of the presence of animus on the part of the Respondent, to establish a prima facie case either that the Respondent treated these employees differently after it had knowledge of their union activities, or that the Respondent treated these employees differently from other employees who were not strong union supporters. Therefore, I would agree with the judge's recommendation to dismiss these allegations.

[2] He testified to all three times.

[3] I rely on the facts essentially as found by the judge as to the dates when these employees were disciplined. I am aware that, while the judge indicated that Kniffin received a warning in early April, the record shows this might have occurred in mid- or late April. The majority finds that Kniffin was first disciplined after he signed his authorization card on April 16. Given that Kniffin testified to three different times when he was first disciplined and the judge selected the earliest of those times, I cannot join the majority's choice of a later date. Moreover, even if the discipline did not occur until mid-April (or even late April), the key factor would be when Kniffin was disciplined vis-a-vis the Respondent's knowledge of union activities, which was not shown to be before late April, and not, as the majority seems to find, simply when Kniffin signed a card. As noted, I am not satisfied the General Counsel has sustained the burden of showing, at the least, that Kniffin's discipline occurred only after the Respondent had knowledge of its employees' union activities, let alone his own union activity.

In addition, I am not satisfied that the majority takes sufficiently into account Biegaj's oral warnings in late March and early April, which occurred before the Union's organizing campaign and undeniably before the Respondent had knowledge of it. The majority acknowledges this prior discipline, but in doing so appears to draw a distinction between these oral warnings and the written warning that Biegaj received in May. The complaint allegation does not rely on such a distinction, and I see no indication that the case was argued that way.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees regarding their knowledge of, or sympathies for, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 376, AFL–CIO, or any other labor organization.

WE WILL NOT conduct surveys of our employees' attitude toward their working conditions, implicitly promising thereby to correct inequities in their working conditions, in order to encourage opposition to a union.

WE WILL NOT promise or grant benefits to our employees in order to convince them to withdraw their support from the Union.

WE WILL NOT discharge, discipline, or otherwise discriminate against any of you for supporting the Union.

WE WILL NOT more strictly enforce our work rules because our employees have engaged in union and other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL rescind the stricter enforcement of work rules which we unlawfully initated in retaliation for our employees' union and other protected concerted activities, and WE WILL make whole, with interest, any employees who suffered any loss of earnings and other benefits as a result of our stricter rules enforcement.

WE WILL offer Brian Kniffin immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discipline, less any net interim earnings, plus interest.

WE WILL notify Brian Kniffin and all employees disciplined pursuant to our unlawful stricter enforcement of work rules that we have removed from our

files any reference to their discipline and that the discipline will not be used against them in any way.

HUTTIG SASH AND DOOR COMPANY D/B/A WEATHER SHIELD OF CONNECTICUT

Thomas R. Gibbons. Esq., for the General Counsel.
George V. Gardner, Esq., for the Respondent.
Robert Madore, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on January 9 and 10, 1988, in Hartford, Connecticut. The charge in Case 39–CA–3516–2 was filed on July 17, 1987,[1] by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 376, (the Union). The complaint based upon this charge issued on July l. On August 8, the Regional Director for Region 1 of the Board issued a report on Objections and Challenged Ballots. In that report, the Regional Director found that the determinative challenged ballots raise substantial and material factual issues best resolved through record testimony and ordered said challenged ballots to be consolidated with the above-mentioned complaint. Of the nine objections filed, some were withdrawn. He found that the others raised substantial and material issues of fact that can best be resolved by record testimony and thereby ordered that the following objections also be consolidated with the above-mentioned complaint:

1. The Stipulated Election Agreement required that a list of names and addresses of eligible voters be provided on July 3, 1987. A list of names was mailed by the Respondent on July 6, and received by the Board on July 7. Petitioner wrote to the NLRB on July 7, protesting this breach of the Stipulated Election Agreement. A list of names and addresses was finally received by the Board on Friday, July 11, a full week late. That list included numerous supervisors, and employees hired after the payroll cutoff date.

3. The Respondent conducted a survey of employees following the filing of the representation petition, and solicited grievances from those employees. The Respondent also solicited grievances during meetings with employees held after the petition was filed.

4. During meetings with employees, respondent has promised to build a lunch room or cafeteria.

6. On Monday, July 20, Respondent provided a buffet lunch to all employees.

7. After the petition was filed, the Respondent disciplined, discharged, and selectively enforced work rules and more stringently enforced work rules against James Biegaj, Douglas Clark, Brian Kniffin, and other employees, because said employees engaged in protected concerted activities with other employees, and in order to discourage employees from engaging in such activities. This conduct is among the subjects of NLRB Case 39–CA–3516–2. A complaint is due to be issued shortly in this matter.

[1] All dates are in 1987 unless otherwise specified.

This consolidation was accomplished by an order consolidating cases issued on September 1.

On October 19 and November 23, the Union filed an additional charge and an amended charge in Case 39–CA–3648; on December 2 a complaint, and notice of hearing in this matter issued. On December 7, an order further consolidating cases issued, consolidating Case 39–CA–3648 with Case 39–CA–3516–2, already consolidated with Case 39–RC–754.

As finally consolidated, the complaint alleges that Huttig Sash and Door Company, d/b/a Weather Shield of Connecticut, engaged in the following numerous actions in violation of Section 8(a)(1) and (3) of the Act: In or about late April, near the entrance to its facility, created the impression among its employees that their union activities were under surveillance; on or about May 1, in the shipping department at its facility, interrogated its employees regarding their union sympathies; since April 1, maintained and enforced its existing work rules by selectively and disparately applying them only against employees who joined or assisted the Union; on or about June 26, at its facility, conducted an attitude survey among its employees and by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment; on or about July 17, at its facility, promised to provide its employees with a lunchroom if they rejected the Union in the upcoming election, and on or about July 27 provided its employees with a lunchroom; on or about July 20, at its facility, promised to provide its employees with a pension plan if they rejected the Union in the upcoming election; and on June 4 and June 16 discharged Kniffin and Clark due to their activities on behalf of the Union.

The consolidated complaint also directs me to determine the eligibility of challenged voters James Hutton, Chris Johnson, Rich Michnowicz, David Clement, and Douglas Clark as well as the above-described objections.

On the entire record, including my observation of the witnesses herein, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

There being no dispute, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

On May 26, the Union filed a petition to represent Respondent's production and maintenance employees. On June 30, the Regional Director approved a Stipulated Election Agreement executed by the parties for an election to be held on July 21 among Respondent's employees employed during the payroll period ending June 19 in the following unit:

> All full-time and regular part-time production and maintenance employees, including leadmen, shipping and receiving employees, and drivers employed by the Employer at its Middletown, Connecticut facility; excluding all other employees, managerial employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

The tally of ballots for the election showed:

Number of votes case for Petitioner—19
Number of votes cast against participating labor organization—20
Number of Challenged Ballots—5
Challenges are sufficient in number to affect the results of the election

On July 23, the Union filed the timely objections referred to, supra.

The Union conducted a number of meetings with Respondent's employees at a park about a mile from Respondent's facility beginning in about mid-April; in addition, as discussed more fully, infra, some employees solicited other employees to sign union authorization cards at the vicinity of Respondent's facility. There are two 8(a)(1) allegations regarding Richard Michnowicz who, at the time, was admittedly a supervisor-warehouse superintendent (his status allegedly changed in about mid-June, as discussed more fully infra). Employee James Biegaj testified that on or about May 1, as he and another employee were returning to work ten minutes late from lunch and a union meeting, Michnowicz told them ''hurry up, you guys, you have . . . to go to a meeting, get to work.''Biegaj testified that he felt that Michnowicz knew that he was involved with the Union: ''I didn't hide the fact. I never said to anyone in management that I was involved, but I wore a Union cap at times.'' Michnowicz did not testify regarding this allegation.

Employee Thomas Franklin testified that about the beginning of May, shortly before he left Respondent's employ, as he was working on the loading dock at the facility, Michnowicz approached him and asked him if he knew anything about the ''Union business'' and Franklin said that he knew quite a bit. Michnowicz asked him if he wanted to talk about it and Franklin said that he did not. Franklin told him that it was ''just a lot of talk'' and Michnowicz said that he understood ''that it was more than talk.'' Michnowicz testified that he had been aware of the union organizing campaign since about late April and he did ask Franklin some ''general questions'' about the Union, whether they had the required amount of support to get an election and how many employees supported the Union. He did not ask about the union sympathies of Franklin or any other employee.

It is next alleged that on about June 26, Respondent conducted an attitude survey and by soliciting employee complaints and grievances, implicitly promised its employees increased benefits and improved terms and conditions of employment, in violation of Section 8(a)(1) of the Act. The sole support for this allegation is the testimony of Biegaj that in about late June, he and other employees from his department were told to meet in a room with ''an independent survey group.'' He testified: ''They gave us a survey sheet to fill out, asking questions about working conditions, wages, do we like it here, do we like our supervisor, questions of that nature.'' He was never told of the purpose or what the result of this survey was, nor was there ever any other survey done previously or subsequent to this time.

Also alleged is that on about July 20, Respondent promised to provide its employees with a pension plan if they rejected the Union as their collective-bargaining representative, in violation of Section 8(a)(1) of the Act. The sole evidence supporting this allegation is a July 20 letter from Coulter Schmitt, manager of Respondent, which stated, inter alia:

> Many have asked if we have a pension plan. We do have a pension plan for non-union branches. After this company has been a part of Huttig for one year we will go to the Board of Directors for ratification. At that time this branch will have a pension plan for non-union employees.

John Slavin, who is in charge of purchasing and scheduling for Respondent, testified that in about 1986 Huttig Sash and Door Company purchased Respondent ''and at that time, we started switching over systems . . . as our health benefits were out or were up for renewal, we went into the Huttig health benefits. . . . When we became eligible for some of the Huttig benefits, like pension, we were given those.'' Respondent attempted to introduce into evidence a September 5, 1986 letter from Huttig, allegedly, to all its employees at the facility, outlining its pension plan. It was not received because it was not properly authenticated.

The complaint also alleged that on about July 17, Respondent promised to provide its employees with a lunchroom if they rejected the Union as their collective-bargaining representative, and, on about July 27, did provide them with a lunchroom, all in violation of Section 8(a)(1) of the Act. Biegaj testified that for the period before the election, Schmitt conducted regular meetings with the employees. At one of these meetings about a week prior to the election, a number of employees asked why they didn't have a lunch room when the sales people had their own lunch room. Schmitt (who did not testify) told them that Respondent would get them a lunchroom within a couple of days, and that the room would have some tables and chairs, a microwave oven, and refrigerator. He said that he was doing it to create a better working environment at the facility. A day or two after the election, a back room of the warehouse was converted to a lunchrom with tables and chairs, a microwave oven, and a refrigerator.

It is next alleged that since about late April, Respondent has more strictly enforced its existing work rules and, since that time, has maintained and enforced its existing work rules by selectively and disparately applying them only against employees who supported the Union or engaged in other concerted activities. Biegaj testified that from the time he began his employment with Respondent, he would arrive late for work, sometimes two or three times a week, and he observed other workers arrive late for work as well. Franklin testified that he did not arrive late for work, but three or four other employees came in late several times during the week. Biegaj testified that at about the beginning of May, Michnowicz, told him that lateness would not be tolerated anymore by Respondent. In March and early April, Biegaj had received oral warnings for lateness; on May 4, he received a written warning for lateness. Brian Kniffin received a verbal warning for lateness in early April and two written warnings for lateness in about the end of April or the beginning of May. Douglas Clark testified that at the end of April, Michnowicz gave him a verbal warning for leaving work early the prior day (at the regular quitting time, but when overtime work was scheduled) prior to completing his work. He had previously left work at his station without receiving

a warning. Slavin testified that was no change in the number of reprimands issued between the period of before and after the employees' union activities.

At the end of April or beginning of May, Biegaj, Kniffin, and Clark discussed amongst themselves their unhappiness at required overtime work; their regular working hours were 7 a.m. to 3:30 p.m., but overtime work was fairly frequent and mandatory. Later that day, they met with Michnowicz and told him of their complaint. Kniffin and Biegaj testified that they complained to Michnowicz that they were receiving warnings for arriving late for work or leaving early, while other employees were not receiving similar warnings. Clark testified that he and the other employees discussed amongst themselves that they were upset at the large amount of overtime work they were required to work and they ''. . . confronted Rich Michnowicz at his office and told him that we didn't . . . want to stay late unless it was posted.'' Michnowicz testified that the employees discussed both subjects with him; at the meeting (in about early May) they complained that he was being unfair. He told them that any reprimands were between him and the employee involved. They also complained about the hours they were required to work. He told them that if they had a legitimate excuse, they would be excused from working overtime; otherwise they had to work overtime.

Kniffin signed an authorization card for the Union at a meeting on April 16; he solicited other employees to sign union cards at other union meetings and during breaktimes and before and after work in the facility's parking lot or in a nearby park. As stated, supra, he had received warnings for reporting late for work. Kniffin testified that on June 4 he reported for work and his timecard was not in its slot. When he asked where his timecard was, Michnowicz told him that he was fired; when he asked why, he told him ''misconduct and lack of production.'' At a subsequent hearing for Unemployment Compensation, Michael Morton, Respondent's branch manager and agent, testified that Kniffin was fired because he left work at 1 p.m. on June 3. Kniffin testified that on that day, he told Michnowicz that he had to leave at 3:30 that day in order to pick up a new car that he had just purchased and Michnowicz said that it was okay to do so, and Kniffin remained at work that day until 3:30. Michnowicz testified that on June 3, at about 1 p.m., he noticed that no work was being done on Kniffin's trailer and he looked for him. He asked other people and nobody had seen him and he could not find him for the rest of the day. He looked at his timecard and it indicated that he had punched out. On the following day, Michnowicz brought Kniffin into Morton's office at which time he accused Kniffin of leaving by 1 p.m.; Kniffin did not deny that he had left early. The prior month he had posted a notice in the plant that employees were to remain at work until 5 p.m. except when they obtained permission to leave earlier.

At the end of April, Michnowicz gave Clark a verbal warning for leaving work early (at 3:30 p.m., the normal quitting time) while there was still work that had to be done. Clark testified that he did, in fact, leave work at his bench when he left work that day at about 3:30 p.m., but he had never previously been warned for that and he had seen other employees do so without being disciplined. On May 4, Michnowicz gave him another written warning for poor production and poor attendance. Prior to that he had never been told that his production was lower than it should be, but he had been previously told that he was not where he was supposed to be during working time. On June 4, his timecard had been removed from the rack; when he asked about it, Morton said that he was suspending him for a day for not reporting for work on June 2. On June 16, Morton asked Clark to come to his office; when he arrived, Slavin was there as well. Morton told him that his production was not where it should be after 6 months' employment and they would have to let him go. Clark testified that he disputed this assertion, but could not recall what he said.

Slavin testified that the three employees in the window department Clark, John Yurko, and Arnold Turner—do basically the same work, assembling windows. Clark was competent, and on some days his production was equal to that of Yurko and Turner. However, ''in general, he was away from his work place an awful lot, and he just wasn't producing.'' Production records for March through June establish that the production of Yurko and Turner was about 45 percent above that of Clark during this period. On occasion, Slavin would ask Clark if he was having any problems with the work and he said that he wasn't; he also told Clark that he had to do better. Slavin also told him that the windows he was working on had to be completed that day and Clark said that they would be; a vast majority of his work days he did not complete his work. Turner and Yurko also complained about the fact that Clark was not completing his work and they had to complete it for him. Respondent decided to terminate Clark, but prior to doing so met with Respondent's attorney who asked whether the decision was based solely upon the fact that his production was poor, or whether it had anything to do with his union activity.[2] Morton, Slavin, leadman Paul Ruffoni (who replaced Michnowicz who was on vacation that week), and leadman David Clement, who worked in an adjacent area and observed Clark's working habits, all answered that their decision was based solely on his poor work habits. Clark was notified of his discharge on June 16; Morton and Slavin were present for Respondent. Morton explained that the reason for the discharge was lack of productivity; Clark neither questioned this, nor did he ask for an explanation.

Michnowicz testified regarding Clark's work: ''As far as the quality, there was no problem, but as far as the quantity, it was far below the norm of the other employees.'' At least once a week, Michnowicz stayed late at work to complete windows that Clark should have completed, but didn't. Michnowicz became superintendent in the department in early to mid-March; he began speaking to Clark about his production problem in mid to late April. On a number of occasions, Michnowicz spoke to Clark about his poor production and told him that if it didn't improve, he would have to take disciplinary action against him. He gave Clark at least two verbal warnings for lack of production. Clark's problem (according to Michnowicz and Slavin) was that he would leave his workstation to speak to other employees. On

[2] Michnowicz testified that at about the end of April he became aware that the Union was conducting meetings of Respondent's employees and that employees were signing cards for the Union. The first time he discussed this with any other supervisor was in late May or early June when he spoke to Slavin about it. When asked whether he knew of Clark's union activities, Slavin testified: ''No, not specifically,'' but that he and Morton suspected that Clark was involved with the Union.

a number of occasions, Michnowicz found him away from his station speaking to other employees and Michnowicz spoke to him about it; Clark did not respond; he simply returned to his station. A few times a week, Yurko and Turner complained to him about Clark's lack of production. Yurko (the leadman in the department) testified that he worked adjacent to Clark and observed that his production was below what it should have been. He had numerous conversations with Clark about increasing his production. Eventually, he gave up and told Michnowicz that he was unsuccessful in improving Clark's production. Clark's production affected him, because he and Turner had to produce more to compensate for Clark's lack of production. Turner testified that he observed that Clark often left his workstation to speak to other employees and also left work early. Additionally, his production was slower than he and Yurko. He complained about this to Yurko, Michnowicz, and Slavin.

Biegaj[3] testified that on the day that Clark was fired, Morton (who is no longer employed by Respondent, and did not testify) called him into his office and told him that Clark's termination had nothing to do with the Union; it was for lack of production. He also testified that in late June, while Clark was leafleting in front of the facility, Michnowicz pointed to the front of the facility and said: ''From now on, because of my little friend out there, we will not tolerate tardiness or leaving before the job is done.''

Clark signed a union card on April 16 at a meeting conducted at a park about a mile from the facility. Over the next few weeks, he solicited other employees to sign a notebook indicating their support for the Union and then asked them to sign union cards. He did this during lunch and breaktimes in the parking lot at the facility.

III. ANALYSIS

When Biegaj and other employees returned from lunch 10 minutes late, Michnowicz commented: ''. . . hurry up, you guys, you have . . . to go to a meeting, get to work.'' In *South Shore Hospital*, 229 NLRB 363 (1977), the Board stated that the test to be applied in determining whether an employer created an impression of surveillance is whether employees would reasonably assume from the statement that their union activities had been placed under surveillance. When the employees returned late from lunch, Michnowicz was obviously annoyed, and told them so. The main thrust of the statement was his concern at their returning late from lunch. He mentioned the meeting because he apparently assumed that was the cause of their lateness. I do not believe that the employees would reasonably believe that their union activities were under surveillance, and I would therefore recommend that this allegation be dismissed.

At about this same time, Michnowicz questioned Franklin about the Union. Franklin testified that Michnowicz asked if he knew anything about the ''union business'' and he said that he did. Michnowicz asked him if he wanted to talk about it and he said that he didn't, but that it was ''just a lot of talk.'' Michnowicz said that he understood that it was more than that. Michnowicz testified that he only asked Franklin general questions about the Union—how many employees supported the Union and whether they had enough support to obtain an election. Either way, as there is no evidence that Franklin was an openly active union supporter, or maintained a friendly relationship with Michnowicz, the interrogation violates Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

In *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), the Board stated:

> Where, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.

The evidence establishes that about a month after the Union filed the petition, and at about the same time that the parties were agreeing on a stipulated election, Respondent arranged for a company to conduct a survey of its employees regarding their wages, working conditions and ''questions of that nature.'' As Respondent apparently, has never previously conducted such a survey among its employees and as it took place so close to the election, I assume its purpose was to interfere with the employees free choice in the upcoming election and therefore violates Section 8(a)(1) of the Act. *Electric Hose & Rubber Co.*, 267 NLRB 488 (1983); *UARCO Inc.* 216 NLRB 1 (1974.

I would likewise find that the promise and creation of a lunchroom for the employees violated Section 8(a)(1) of the Act. The promise was made to the employees within a week prior to the election and granted a day or two after the election. As Respondent never introduced any evidence to explain the extremely suspicious timing of the announcement and granting of this benefit, it is difficult to imagine a more obvious violation.

More difficult for determination is whether Respondent's July 20 letter to its employees regarding pensions violated Section 8(a)(1) of the Act. In this regard, I credit Slavin's testimony and find that the employees would have received this pension even if they had not signed with the Union. However, I also find that the July 20 letter was the first time Respondent informed the employees of the pension program; otherwise, why would the letter state: ''Many have asked if we have a pension plan?'' In *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844 at 850 (D.C. Cir. 1984), the Court stated:

> Section 8(a)(1) ''prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for against unionization and is reasonably calculated to have that effect.'' An 8(a)(1) violation may occur where the timing of an otherwise legitimate conferral of benefits is too close to an election. If a benefit is ''granted in the normal course of the business of an

[3] In that same conversation, Morton offered Biegaj a leadman's position, but he refused it. Sometime between that time and the time he was laid off in August, he received an increase in pay. Biegaj solicited cards for the Union and, at times, wore a union hat to work.

> employer, without any motive of inducing employees to vote against the union . . .'' no violation occurs. This ''normal course of business'' analysis applies to two distinct issues; the decision to confer benefits and the timing of the grant of such benefits. Thus, the timing of the announcement of a wage increase may violate Section 8(a)(1), ''even though the employer's initial decision to raise wages was perfectly legitimate.'' [Citations omitted.]

In *Predicasts, Inc.*, 270 NLRB 1117, 1120 (1984), the Board stated: ''In the absence of a showing that the timing of an announcement was governed by factors other than the pendency of union activity, such timing is calculated to influence employees in choosing a bargaining representative.'' See also *Montgomery Ward & Co.*, 288 NLRB 126 (1988); *NLRB v. State Plating & Finishing Co.*, 738 F.2d 733 (6th Cir. 1984). The evidence establishes that Huttig purchased Respondent a year before the events herein, yet Respondent waited until the day before the election to announce to its employees that Huttig's pension plan would soon cover them. Respondent produced no evidence to justify the timing of its announcement; it therefore violates Section 8(a)(1) of the Act.

I find insufficient evidence to support the Section 8(a)(1)(3) allegation that since late April Respondent has more strictly enforced its work rules against employees who supported and assisted the Union. The sole evidence supporting this allegation is Biegaj's uncontradicted testimony that in late June, Michnowicz pointed to the front of the facility where Clark was leafleting, and said that ''because of my little friend out there,'' Respondent would no longer tolerate lateness or leaving work prematurely. However, as discussed fully, infra, Michnowicz was no longer a supervisor or agent of Respondent at the time as his last day of employment with Respondent in that capacity was June 12.

The final allegations are that on June 4 and June 16, Respondent discharged Kniffin and Clark due to their activities on behalf of the Union, in violation of Section 8(a)(1)(3) of the Act.

In *Wright Line*, 251 NLRB 1083 (1980), the Board set forth the rule to be applied in discrimination cases such as the instant matter: ''First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.''

I find that General Counsel has sustained his initial burden; both Kniffin and Clark were active in soliciting fellow employees to sign union cards, and Respondent was aware of the union activity at the facility prior to the discharges. The timing is also on General Counsel's side; Kniffin and Clark were both fired within a month of their union activity. I also find that Respondent has sustained its burden that Kniffin and Clark would have been fired even absent their activity on behalf of the Union. Most persuasive is the absence of any evidence on union animus on the part of Respondent. In fact, the evidence establishes that Biejag, who was just as active for the Union as Kniffin and Clark, and at times wore a union hat to work, was offered a promotion to leadman during this period. Additionally, I generally found Respondent's witnesses credible and would therefore credit Michnowicz (even with the absent timecard) that Kniffin left work at 1 p.m. without permission on June 3 and the testimony of Slavin, Michnowicz, Yurko, and Turner (as supported by the production statistics received in evidence) that Clark's production was substantially below that of Yurko and Turner. I therefore recommend that the allegations that Kniffin and Clark were discharged in violation of Section 8(a)(1)(3) of the Act be dismissed.

IV. THE OBJECTIONS

As stated, supra, consolidated with the unfair labor practice allegations herein are objections, some of which are coextensive with the unfair labor practices alleged.

Objection 1: This objection alleges that Respondent submitted the *Excelsior* list late. The evidence establishes that the Stipulated Election Agreement was executed by the parties and signed by their attorneys on June 26 and June 29; it was approved by the Regional Director on June 30. The election was scheduled for July 21. The standard language contained in the Stipulated Election Agreement stated:

> The employer shall provide to the Regional Director, within 7 days after the Regional Director has approved the Agreement, an election eligibility list containing the names and addresses of all eligible voters. *Excelsior Underwear*, 156 NLRB 1236.

On July 7, the Board office received a list of employees from Respondent; the list included employees employed after the eligibility date, and some supervisors, as well, but did not include the employees' addresses. By letter dated July 7, counsel for the Union wrote to the Board to protest the alleged lateness of receipt of the list, the absence of addresses, and other deficiencies.

By letter dated July 7 (a Tuesday), Morton wrote to the Board Agent handling the matter: ''Per your request, please find enclosed list of employees;'' the employees' names and addresses were enclosed. Stephen Edgerly, financial secretary for the Union, testified that the Union did not receive this list until July 11.

Excelsior, supra, requires that within 7 days after the Regional Director has directed, or approved of, an election agreement, the employer will file with the Regional Director an election eligibility list containing the names and addresses of the eligible voters; the Board then submits this list to the Union. Not every failure to comply with this rule means that the election is overturned as the Board has not applied the rule mechanically. Rather, it takes into consideration a number of factors:

> (l) The number of days the list was overdue; (2) the number of days the union had the list prior to the election; (3) the number of eligible voters in the unit; and (4) whether the Union took any action when it became aware that the list was overdue. *Wedgewood Industries*, 243 NLRB 1190 (1979); *Goodyear Tire & Rubber Co.* 273 NLRB 36 (1984); *NLRB v. All-Weather Architectural Aluminum*, 692 F.2d 76 (9th Cir. 1982).

On the basis of the above, I would sustain this objection and overturn the election. The Regional Director approved

the Stipulated Election Agreement on June 30; the *Excelsior* list was therefore due to be received at the Board office on July 7.[4] It was received by the Board on that date, but with a crucial omission—the list contained no addresses. Edgerly testified that the corrected list, containing addresses, was not received by the Union until July 11. I have some difficulty with this testimony because July 11 is a Saturday, and the letter accompanying the corrected list is dated July 7; however, since Respondent introduced no evidence to rebut this testimony, and Edgerly appeared to be a credible witness, I would credit this testimony. The Union only had 10 days to contact the employees in the unit of about 50 people. This loss of 4 days time (almost 30 percent of the available time) was due to an error by Respondent which, if not intentional, was due to extreme negligence. To make matters worse, an error like that should have been corrected immediately; instead, it apparently took Respondent 4 days to get the corrected list to the Union. These facts, together with the fact that the Union immediately protested the delay in its receipt of the list, and the closeness of the vote at the election, convince me that this objection should be sustained and the election overturned, and I so recommend.

Objections 3 and 4: Based on my findings as discussed above, I would sustain Objections 3 and 4.

Objection 6: As no evidence was adduced regarding this objection, I recommend that it be overruled.

Objection 7: Based on my findings as discussed above, I would overrule Objection 7.

V. THE EFFECT OF SUCH CONDUCT ON THE ELECTION

As I have recommended that Objections 1, 3, and 4 be sustained, it is recommended that the election conducted on July 21 be set aside and that a new election be conducted at a time and place to be determined by the Regional Director.

VI. CHALLENGED BALLOTS

James Hutton: Hutton was challenged because his name was not on the eligibility list. Respondent's position is that Hutton is a serviceman and not a supervisor within the meaning of the Act. The only evidence regarding Hutton establishes that he worked in the service department and is away from the facility most of the time on service calls. I therefore find that he was an eligible voter and recommend that his challenged ballot should be opened and counted.

David Clement: The Union challenged Clement as a supervisor within the meaning of the Act; Respondent's position is that he is a leadman, but not a supervisor within the meaning of the Act. Employee James Biegaj testified that Clement was the ''supervisor of the Box Shop'' who effectively recommended discipline. When asked whether he recalled any individual who Clement disciplined, he testified: ''I don't recall it specifically, but I know that there were occasions where there was discipline involved.'' Slavin testified that Clement was the leadman of the Box Shop who could neither hire or fire, or effectively recommend such. No independent judgment was present in assigning work and he was paid less than 25 percent more than the other employees in the department. He wore the same clothes, used the same tools and enjoyed the same vacation, health, and pension benefits as the other employees. As I credit Slavin's direct (rather than conclusory) testimony regarding Clement, I find that he was not a supervisor within the meaning of the Act and therefore is an eligible voter. I recommend that his challenged ballot be opened and counted.

Chris Johnson: The Union challenged Johnson because he was the ''head of the Box Shop''; Respondent alleges that he is a leadman just as Clement is and not a supervisor within the meaning of the Act. Slavin testified that, like Clement, he could neither hire or fire employees, nor could he effectively recommend such action. His work assignments were of an ordinary variety and his pay was less than twenty five percent more than the other employees in the department. He wore the same clothes, used the same tools, and enjoyed the same vacation, health and pension benefits as the other employees. I find that he is not a supervisor within the meaning of the Act and is therefore an eligible voter. I recommend that his challenged ballot be opened and counted.

Richard Michnowicz: The Union challenged the ballot of Michnowicz on the ground that he was a supervisor within the meaning of the Act; Respondent admits that he was a supervisor within the meaning of the Act and in charge of its warehouse as superintendent, but only until about June 16; at that time, he requested, and was granted, a transfer to rank-and-file status. His status is based solely on his testimony; on either June 11 or 12 (Thursday or Friday), he met with Michael Morton, Respondent's general manager and told him that he wanted to be relieved of his supervisory duties. He testified that the reason he wished to return to rank-and-file status was that his work responsibilities became so heavy, that he often had to stay late at the facility in order to complete his work, causing complaints from his wife with a resulting strain on his personal life; ''I was . . . having problems at home because of the hours, and I as getting frustrated at work. I just wanted out.'' One factor in this was the inadequate quantity of production by Clark, one of the window makers in his department (as discussed more fully, supra). He testified that about once a week,

> everyone would be gone; I'd go around the benches and make sure everything was done. His [Clark] clipboard would still have units on it which had to get loaded on the trucks, so naturally I would finish off the units and make sure they would get on for the following day delivery.

At his meeting with Morton on either June 11 or 12, Morton agreed that he would be relieved of his supervisory duties. Michnowicz also told Morton that he would like to take a week's vacation beginning the following Monday, June 15, and Morton agreed and he did not work that week. He returned to work on Monday, June 22 as an hourly paid employee. He testified that before leaving for vacation, he knew that when he returned to work on June 22 that he would be a rank-and-file employee, but he doesn't recall whether his vacation pay was based upon his prior supervisory rate or his rank-and-file hourly rate. Prior to June 12, Michnowicz was earning $32,000 a year; when he returned as a rank and file employee his hourly wage became $11.50 an hour. As an hourly employee, he punched the timeclock (which he had not previously done), worked with his tools as did the other

[4] I do not understand Edgerly's testimony that the list was due to be received on July 3.

employees in the department, and enjoyed the same benefits as the other hourly paid employees.

In order to be eligible to vote, an individual must be employed and working on the established eligibility date, unless absent for certain permitted reasons such as illness or a temporary layoff. *Ra-Rich Mfg. Corp*., 120 NLRB 1444 (1958); *St. Elizabeth Community Hospital v. NLRB*, 708 F. 2d 1436 (9th Cir. 1983). In *Emro Marketing Co.*, 269 NLRB 926 fn. 1 (1984), the Board stated that it has consistently held ''that in order to be 'employed during the payroll period' and be eligible to vote, an employee must perform unit work during the payroll period . . . .'' See also *Pacific Telephone & Telegraph Co.*, 241 NLRB 1064 (1979); *NLRB v. Tom Wood Datsun*, 767 F.2d 350 (7th Cir. 1985). The eligibility date herein was June 19; it wasn't until June 22 that he began performing rank-and-file unit work. He therefore was ineligible to vote in the election even though he was told on June 11 or 12 that his request to cease being a supervisor had been granted. As stated, supra, the crucial date is not when the decision was made, but rather when he actually began working as a nonsupervisory employee. For these reasons, I recommend that the challenge to his ballot be sustained.

VII. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent described above have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. The Respondent, Huttig Sash and Door Company, d/b/a Weather Shield of Connecticut, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) By interrogating its employees regarding their support for, and knowledge of, the Union.

(b) By conducting a survey of its employees' attitude toward their working conditions, implicitly promising to correct inequities.

(c) By promising, and creating for its employees, a lunchroom.

(d) By informing its employees of its pension plan on the day before the election.

4. The Respondent did not further violate the Act as also alleged in the consolidated complaint.

5. The Respondent's unlawful conduct interfered with the representation election conducted on July 21, 1987.

6. James Hutton, David Clement, and Chris Johnson are not supervisors within the meaning of the Act and their ballots should therefore be opened and counted. I also recommend that the challenges to the ballots of Richard Michnowicz and Douglas Clark be sustained and their ballots not be counted.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]